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Bukit Melita Sdn Bhd v Revolusi Rancak Sdn Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C-02(IM)-1442–07 OF 2017
DAVID WONG, ABANG ISKANDAR AND MARY LIM JJCA
6 DECEMBER 2019

C *Civil Procedure — Appeal — Assessment of damages — Whether legality of order for assessment of damages was caught by res judicata — Whether there must be specific prayer for damages — Whether High Court seized with jurisdiction to order assessment of damages — Whether order on assessment of damages valid — Specific Relief Act 1950 s 18*

D

In early 2009, the appellant had agreed to sell to the respondent, three pieces of land in Bentong, Pahang at the price of RM2,585,362; RM2,598,362; and RM3,402,750 respectively. The respondent had paid an 'earnest deposit' to the appellant for each of the properties, amounting to RM51,707.24; E RM51,967.24; and RM68,055 respectively. The total sum paid as earnest deposits was RM171,729.40 leaving the balance purchase price of RM8,207,915.56 to be paid. The sale and purchase agreement ('S&P') was signed on 16 June 2009. The appellant, through his solicitor unilaterally and without the consent of the respondent made amendments to the S&P. F However, at the same time, it accepted and encashed the cheques issued by the respondent, as earnest deposits to confirm that the S&P had been agreed upon by both parties and would be executed by the appellant. The amended S&P was then returned to the respondent. Upon realising the unilateral amendment, the respondent protested and disagreed with the S&P. The G respondent then filed an action in the High Court ('Suit 2010') demanding, among others, for the specific performance of the original S&P on 21 September 2011, the High Court of Temerloh ordered, among others, specific performance, that the appellant was to complete the sale of the three pieces of lands to the respondent. The court also decided that the parties were bound by H the original S&P and ordered the appellant's director to transfer the properties to the respondent ('the judgment'). Aggrieved by the judgment, the appellant had filed an appeal against the judgment at the Court of Appeal. However, the appeal was dismissed on 9 September 2013. The application for leave to appeal to the Federal Court was also dismissed on 29 April 2014. Despite the fact that I the court had ordered the specific performance of the original S&P and that the first defendant had exercised all rights of appeal, still the appellant failed to execute the S&P and transfer the properties to the respondent. Hence, the respondent had requested the S&P to be executed by the deputy registrar on behalf of the appellant on 8 May 2012. Still dissatisfied with the judgment, the

appellant then filed a new suit at the Kuala Lumpur High Court No 22NCVC-30–01 of 2015 ('Suit 2015') claiming for among others, a declaration that Suit 2010 was to be set aside and was not binding on the appellant and/or its directors on the ground that the respondent had been late and out of time to execute the S&P. However, Suit 2015 was dismissed on 15 June 2015 under O 18 r 19 of the Rules of Court 2012. The first defendant appealed to the Court of Appeal. However, the appeal was dismissed on 9 March 2016. Despite that, the appellant still refused to complete the sale and transfer of the properties to the respondent. The respondent had on 25 August 2015 filed an application vide encl 54, applying for, among others, vacant possession and original title of the properties for the failure of the appellant to comply with the judgment. The respondent also applied for an order for an assessment of damages vide the encl 54. At the same time, the appellant had engaged a new solicitor to act on its behalf. The new solicitor agreed with the respondent's application in encl 54. Thus, the High Court had granted the respondent's application in terms as prayed in encl 54 on 12 February 2016. One of the prayers that was allowed was for the damages to be assessed, with costs of RM3,000. On 2 June 2016, the plaintiff filed a notice of appointment for assessment of damages ('encl 78'). The appellant had submitted the original titles of the properties to the respondent's solicitor on 13 July 2016. Hence, the respondent claimed damages for the period from 8 August 2012 ('the original completion date of the S&P') until 13 July 2016. After encl 54 was granted, the appellant for the fifth time engaged a new solicitor to handle its case. The appellant had, thereafter, filed applications vide encls 87, 97 and 98, in response to encl 78. Enclosure 87 was the first defendant's application to examine one Selva Rasan a/l Puspa Das ('Selva Rasan') from Messrs Selva & Associates, a qualified accountant who prepared the respondent's estimated loss report. Enclosure 97 was the appellant's application for extension of time to file an affidavit in opposition to the respondent's application for assessment of damages. Enclosure 98 was the appellant's application for a declaration that the respondent was liable for a late payment of RM2,639,165.06 as the plaintiff had yet/refused to pay the balance of the purchase price to the appellant despite having received vacant possession of the properties. Therefore, the appellant contended that the court ought to set aside the transfer of ownership of the properties to the respondent and order that the properties be transferred to the appellant. The respondent had, on the other hand, filed encl 103 for a court order for the respondent to release the remaining purchase price of RM8,187,915.56 to the appellant and for the caveat entered by the appellant on the properties to be immediately removed. All applications were heard together before the same learned judicial commissioner of the High Court ('JC') on 6 June 2017. The learned JC had made the following decisions: (a) the appellant's applications in encls 87, 97 and 98 were dismissed with costs of RM6,000 for each application; and (b) the respondent's applications in encls 78 and 103 were allowed with costs of RM5,000 for each enclosure. Dissatisfied with the above decisions, the appellant filed five separate appeals

('Appeals 1438–1442') for each of the enclosures respectively, to the Court of Appeal.

Held:

(1) The issue as to the propriety, if not the legality of the order ordering an assessment of the damages was not caught by res judicata. The court took the view that the order granting the application by the respondent in encl 54 in respect to it allowing for an assessment of damages as an order that was granted for want of jurisdiction. The court had so found, because it was not disputed that the respondent had in fact abandoned the prayer on damages when it had the statement of claim amended in the course of pleadings (see para 24).

(2) As regards the application of s 18 of the Specific Relief Act 1950 ('the SRA 1950'), the court agreed with learned counsel for the appellant that the exercise of that power, as stipulated under s 18(3) of the SRA 1950, must be predicated upon the fact that there must be a specific prayer asking for damages in addition to the prayer for specific performance. The deficiency in the pleading could not be saved by the catch-all clause that stated, 'any order as the court deems fit' or any clause differently worded but having the same intended effect. In other words, the JC was not clothed with the necessary jurisdiction to make any order in respect of assessment of damages, when in fact and in law, the respondent did not pray for such a relief. It was not seized of any jurisdiction in that regard. The effect of such an act by the court was that such order on assessment of damages was null and void. Section 18 of the SRA 1950 could not in the circumstances assist the respondent in that regard. However, such lack of jurisdiction was only limited to the assessment of damages issue. As to its effect, the court was of the considered view that a null and void order need not be acted upon by the party against whom it was meant to operate (see paras 25–27 & 29).

(3) Since there was no prayer for damages in the first place by the respondent, there existed no legal basis for the learned JC to grant the order for an assessment of damages when he granted encl 54. That being the case, there also was no basis for the learned JC to deal with and grant the various applications filed by both parties in relation to encl 76 which was filed by the respondent as a purported consequence of the order granted on the assessment of damages in encl 54 (see paras 33–35).

[Bahasa Malaysia summary

Pada awal 2009, perayu telah bersetuju untuk menjual kepada responden, tiga keping tanah di Bentong, Pahang masing-masing pada harga RM2,585,362, RM2,598,362 dan RM3,402,750. Responden telah membayar 'pendahuluan cangkeram' kepada perayu bagi setiap hartanah tersebut, masing-masing

berjumlah RM51,707.24, RM51,967.24 dan RM68,055. Jumlah yang dibayar sebagai pendahuluan cangkeram adalah RM171,729.40 meninggalkan baki harga belian RM8,207,915.56 yang perlu dibayar. Perjanjian jual beli ('S&P') telah ditandatangani pada 16 Jun 2009. Perayu, melalui peguamcaranya secara sepihak dan tanpa persetujuan responden membuat pindaan kepada S&P. Walau bagaimanapun, pada masa yang sama, ia menerima dan menunaikan cek yang dikeluarkan oleh responden, sebagai pendahuluan cangkeram untuk mengesahkan bahawa S&P telah dipersetujui oleh kedua-dua pihak dan akan dilaksanakan oleh perayu. S&P yang dipinda kemudiannya dikembalikan kepada responden. Apabila menyedari pindaan sepihak tersebut, responden membantah dan tidak bersetuju dengan S&P tersebut. Responden kemudian memfailkan guaman di Mahkamah Tinggi ('Guaman 2010') menuntut, antara lain, untuk pelaksanaan spesifik S&P asal. Pada 21 September 2011, Mahkamah Tinggi Temerloh memerintahkan, antara lain, pelaksanaan spesifik, bahawa perayu hendaklah memuktamadkan penjualan tiga keping tanah kepada responden. Mahkamah juga memutuskan bahawa pihak-pihak terikat dengan S&P asal dan mengarahkan pengarah perayu untuk memindahmilik hartanah tersebut kepada responden ('penghakiman tersebut'). Terkilan dengan penghakiman tersebut, perayu telah memfailkan rayuan terhadap penghakiman tersebut di Mahkamah Rayuan. Walau bagaimanapun, rayuan tersebut telah ditolak pada 9 September 2013. Permohonan untuk kebenaran merayu kepada Mahkamah Persekutuan juga telah ditolak pada 29 April 2014. Walaupun fakta bahawa mahkamah telah memerintahkan pelaksanaan spesifik S&P asal dan defendan pertama telah melaksanakan semua hak untuk merayu, perayu masih gagal melaksanakan S&P dan memindahmilik hartanah tersebut kepada responden. Oleh itu, responden telah meminta S&P dilaksanakan oleh timbalan pendaftar bagi pihak perayu pada 8 Mei 2012. Masih tidak berpuas hati dengan penghakiman tersebut, perayu kemudian memfailkan guaman baharu di Mahkamah Tinggi Kuala Lumpur No 22NCVC-30–01 Tahun 2015 ('Guaman 2015') yang menuntut antara lain, satu deklarasi bahawa Guaman 2010 diketepikan dan tidak mengikat perayu dan/atau pengarahnya atas alasan bahawa responden telah lewat dan diluar masa untuk melaksanakan S&P tersebut. Bagaimanapun, Guaman 2015 telah ditolak pada 15 Jun 2015 di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012. Defendan pertama merayu kepada Mahkamah Rayuan. Bagaimanapun, rayuan tersebut telah ditolak pada 9 Mac 2016. Sungguhpun begitu, perayu masih enggan memuktamadkan penjualan dan pindahmilik hartanah tersebut kepada responden. Responden telah pada 25 Ogos 2015 memfailkan permohonan melalui lampiran 54, memohon, antara lain, milikan kosong dan hakmilik asal hartanah atas kegagalan perayu mematuhi penghakiman tersebut. Responden juga memohon perintah untuk taksiran ganti rugi berdasarkan lampiran 54. Pada masa yang sama, perayu telah melantik peguamcara baru untuk bertindak bagi pihaknya. Peguamcara baru bersetuju dengan permohonan responden di lampiran 54. Justeru, Mahkamah Tinggi telah membenarkan permohonan

responden mengikut terma seperti yang dimohon dalam lampiran 54 pada 12 Februari 2016. Salah satu prayer yang dibenarkan adalah agar ganti rugi ditaksir, dengan kos RM3,000. Pada 2 Jun 2016, plaintif memfailkan notis temujanji untuk taksiran ganti rugi ('lampiran 78'). Perayu telah menyerahkan hakmilik asal hartanah tersebut kepada peguamcara responden pada 13 Julai 2016. Oleh itu, responden menuntut ganti rugi untuk tempoh bermula 8 Ogos 2012 ('tarikh siap S&P asal') sehingga 13 Julai 2016. Selepas lampiran 54 dibenarkan, perayu untuk kali kelima telah melantik peguamcara baharu untuk mengendalikan kesnya. Perayu telah, selepas itu, memfailkan permohonan mengikut lampiran 87, 97 dan 98, sebagai jawapan kepada lampiran 78. Lampiran 87 adalah permohonan defendan pertama untuk memeriksa seorang Selva Rasan a/l Puspa Das ('Selva Rasan') daripada Tetuan Selva & Associates, akauntan bertauliah yang menyediakan laporan anggaran kerugian responden. Lampiran 97 adalah permohonan perayu untuk lanjutan masa untuk memfailkan afidavit menentang permohonan responden untuk taksiran ganti rugi. Lampiran 98 adalah permohonan perayu untuk satu deklarasi bahawa responden bertanggungjawab untuk pembayaran lewat sebanyak RM2,639,165.06 kerana plaintif masih belum/enggan membayar baki harga belian kepada perayu walaupun telah menerima milikan kosong hartanah tersebut. Oleh itu, perayu berpendapat bahawa mahkamah wajar mengenepikan pemindahan hak milik hartanah kepada responden dan memerintahkan supaya hartanah tersebut dipindahmilik kepada perayu. Responden pula telah memfailkan lampiran 103 untuk perintah mahkamah supaya responden menyerahkan baki harga belian sebanyak RM8,187,915.56 kepada perayu dan supaya kaveat yang dimasukkan oleh perayu mengenai harta-harta itu dibatalkan serta-merta. Semua permohonan didengar bersama di hadapan Pesuruhjaya Kehakiman Mahkamah Tinggi ('PK') yang sama pada 6 Jun 2017. PK yang bijaksana telah membuat keputusan berikut: (a) permohonan perayu dalam lampiran 87, 97 dan 98 telah ditolak dengan kos RM6,000 bagi setiap permohonan; dan (b) permohonan responden dalam lampiran 78 dan 103 dibenarkan dengan kos RM5,000 bagi setiap lampiran. Tidak berpuas hati dengan keputusan di atas, perayu memfailkan lima rayuan berasingan ('Rayuan 1438–1442') bagi setiap lampiran, kepada Mahkamah Rayuan.

Diputuskan,

(1) Isu tentang kewajaran, jika bukan kesahihan perintah yang memerintahkan taksiran ganti rugi tidak termasuk oleh res judicata. Mahkamah mengambil pandangan bahawa perintah membenarkan permohonan oleh responden dalam lampiran 54 berkenaan dengannya membenarkan taksiran ganti rugi sebagai perintah yang diberikan kerana tidak mempunyai bidang kuasa. Mahkamah telah mendapati demikian, kerana ia tidak dipertikaikan bahawa responden sebenarnya telah menolak prayernya atas ganti rugi apabila penyataan tuntutan dipinda

semasa pliding (lihat perenggan 24).

(2) Berkenaan pemakaian s 18 Akta Relief Spesifik 1950 ('ARS 1950'), mahkamah bersetuju dengan peguam bagi perayu yang bijaksana bahawa penggunaan kuasa tersebut, seperti yang ditetapkan di bawah s 18(3) ARS 1950, mestilah berdasarkan fakta bahawa terdapat prayer khusus memohon ganti rugi sebagai tambahan kepada prayer untuk pelaksanaan spesifik. Kekurangan dalam pliding itu tidak dapat diselamatkan oleh klausa catch-all yang menyatakan, 'apa-apa perintah yang difikirkan suai oleh mahkamah' atau mana-mana klausa dengan perkataan yang berbeza tetapi mempunyai kesan yang sama. Dalam erti kata lain, PK tidak mempunyai bidang kuasa yang diperlukan untuk membuat apa-apa perintah berkenaan taksiran ganti rugi, sedangkan pada hakikatnya dan di sisi undang-undang, responden tidak memohon relif sedemikian. Ia tidak dihalang daripada mana-mana bidang kuasa dalam hal itu. Kesan daripada guaman sedemikian oleh mahkamah adalah perintah penaksiran ganti rugi sedemikian adalah terbatal dan tidak sah. Seksyen 18 ARS 1950 tidak dapat membantu responden dalam hal itu. Walau bagaimanapun, kekurangan bidang kuasa tersebut hanya terhad kepada penaksiran isu ganti rugi. Berkenaan kesannya, mahkamah berpandangan bahawa perintah batal dan tidak sah tidak perlu diambil tindakan oleh pihak yang terhadapnya perintah itu bertujuan untuk beroperasi (lihat perenggan 25–27 & 29).

(3) Memandangkan tidak ada prayer untuk ganti rugi pada mulanya oleh responden, tidak wujud asas undang-undang untuk PK yang bijaksana untuk memberikan perintah untuk taksiran ganti rugi apabila beliau membenarkan lampiran 54. Oleh itu, ianya juga tiada asas untuk PK yang bijaksana untuk menangani dan membenarkan pelbagai permohonan yang difailkan oleh kedua-dua pihak berhubung dengan lampiran 76 yang difailkan oleh responden sebagai kesan daripada perintah yang diberikan mengenai taksiran ganti rugi dalam lampiran 54 (lihat perenggan 33–35).]

Cases referred to

Director of Public Prosecutions v Head [1959] AC 83, HL (refd)
Eu Finance Berhad v Lim Yoke Foo [1982] 2 MLJ 37; [1982]1 LNS 21, FC (folld)
London & Clydeside Estates Ltd v Aberdeen District Council and another [1980] 1 WLR 182, HL (refd)
NZ New Image Sdn Bhd v Loh Yok Liang [2016] MLJU 1768; [2016] 9 CLJ 474, CA (refd)
Pow Hing & Anor v Registrar of Titles, Malacca [1981] 1 MLJ 155, FC (refd)
Regina v Paddington Valuation Officer and another, Ex Parte Peachey Property Corporation Ltd [1966] 1 QB 380, CA (refd)

Legislation referred to

Rules of Court 2012 O 18 r 19
Specific Relief Act 1950 s 18, 18(3)

Appeal from: Civil Suit No 22–12 of 2010 (High Court, Temerloh)

Wong Guo Bin (Mah Sue Ann with him) (Izral Partnership) for the appellant.
Gerald Samuel (Jason Chan Wa Chiang with him) (S Mathews & Assoc) for the respondent.

Abang Iskandar JCA (delivering judgment of the court):

BRIEF FACTS OF THE CASE

[1] In early 2009, Bukit Melita Sdn Bhd ('the first defendant') had agreed to sell to Revolusi Rancak Sdn Bhd ('the plaintiff'), three pieces of land in Bentong, Pahang at the price of RM2,585,362, RM2,598,362 and RM3,402,750 respectively.

[2] The plaintiff had paid an 'earnest deposit' to the first defendant for each of the properties, amounting to RM51,707.24, RM51,967.24 and RM68,055 respectively. The total sum paid as earnest deposits was RM171,729.40 leaving the balance purchase price of RM8,207,915.56 to be paid.

[3] The sale and purchase agreement ('S&P') was signed on 16 June 2009. The first defendant, through his solicitor unilaterally and without the consent of the plaintiff made amendments to the S&P. However, at the same time, it accepted and encashed the cheques issued by the plaintiff (as earnest deposits) to confirm that the S&P had been agreed upon by both parties and would be executed by the first defendant.

[4] The amended S&P was then returned to the plaintiff. Upon realising the unilateral amendment, the plaintiff protested and disagreed with the unilaterally amended S&P. The plaintiff then filed an action in the High Court at Temerloh in Civil Suit No 22–12 of 2010 ('Suit 2010') demandings, among others, for the specific performance of the original S&P.

[5] On 21 September 2011, the High Court of Temerloh ordered, among others, specific performance, that the first defendant was to complete the sale of the three pieces of lands to the plaintiff. The court also decided that the parties were bound by the original S&P and ordered the first defendant's director to transfer the properties to the plaintiff ('the judgment').

[6] Aggrieved by the judgment, the first defendant had filed an appeal against the judgment at the Court of Appeal. However, the appeal was dismissed on 9 September 2013. The application for leave to appeal to the Federal Court was also dismissed on 29 April 2014.

[7] Despite the fact that the court had ordered the specific performance of the original S&P and that the first defendant had exercised all rights of appeal, still the first defendant failed to execute the S&P and transfer the properties to the plaintiff. Hence, the plaintiff had requested the S&P to be executed by the deputy registrar on behalf of the first defendant on 8 May 2012.

[8] Still dissatisfied with the judgment, the first defendant then filed a new suit at the Kuala Lumpur High Court No 22NCVC-30–01 of 2015 ('Suit 2015') claiming for among others, a declaration that Suit 2010 is to be set aside and is not binding on the first defendant and/or its directors on the ground that the plaintiff has been late and out of time to execute the S&P. However, Suit 2015 was dismissed on 15 June 2015 under O 18 r 19 of the Rules of Court 2012.

[9] The first defendant appealed to the Court of Appeal. However, the appeal was dismissed on 9 March 2016. Despite the above-mentioned facts, the first defendant still refused to complete the sale and transfer of the properties to the plaintiff.

[10] The plaintiff had on 25 August 2015 filed an application vide encl 54, applying for among others, vacant possession and original title of the properties for the failure of the first defendant to comply with the judgment. The plaintiff also applied for an order for an assessment of damages vide the encl 54.

[11] At the same time, the first defendant had engaged a new solicitor to act on its behalf. The new solicitor agreed with the plaintiff's application in encl 54. Thus, the High Court had granted the plaintiff's application in terms as prayed in encl 54 on 12 February 2016. One of the prayers that was allowed was for the damages to be assessed, with costs of RM3,000.

[12] On 2 June 2016, the plaintiff filed a notice of appointment for assessment of damages (encl 78). The first defendant had submitted the original titles of the properties to the plaintiff's solicitor on 13 July 2016. Hence, the plaintiff claimed damages for the period from 8 August 2012 (the original completion date of the S&P) until 13 July 2016.

[13] After encl 54 was granted, the first defendant for the fifth time engaged a new solicitor to handle its case. The first defendant had, thereafter, filed applications vide encls 87, 97 and 98, in response to encl 78.

[14] Enclosure 87 is the first defendant's application to examine one Selva Rasan a/l Puspa Das from Messrs Selva & Associates, a qualified accountant who prepared the plaintiff's estimated loss report. The report was disputed on the grounds that the validity of the information contained in the report by Selva Rasan was based on assumptions and speculations and the land was not planted with any crops when the original S&P was prepared on 16 June 2009. The sale of land is just an 'as and where is basis'.

[15] Enclosure 97 is the first defendant's application for extension of time to file an affidavit of opposition to the plaintiff's application for assessment of damages.

[16] Enclosure 98 is the first defendant's application for a declaration that the plaintiff is liable for a late payment of RM2,639,165.06 as the plaintiff has yet/refused to pay the balance of the purchase price to the first defendant despite having received vacant possession of the properties. Therefore, the court ought to set aside the transfer of ownership of the properties to the plaintiff and shall make order that the properties be transferred to the first defendant.

[17] The plaintiff had, on the other hand, filed encl 103 for a court order for the plaintiff to release the remaining purchase price of RM8,187,915.56 to the first defendant within seven days from the date of this order after deducting the assessed damages together with interest, costs and that the caveat entered by the first defendant on the properties to be immediately removed.

FINDINGS OF HIGH COURT

[18] All applications were heard together before the same learned judicial commissioner of the High Court ('JC') on 6 June 2017. The learned JC had made the following decisions:

(a) the first defendant applications in encls 87, 97 and 98 were dismissed with costs of RM6000 for each application to be paid by the first defendant to the plaintiff; and

(b) the plaintiff's applications in encls 78 and 103 were allowed with costs of RM5,000 for each enclosure to be paid by the first defendant to the plaintiff.

[19] Dissatisfied with the above decisions, the first defendant filed five separate appeals for each of the encls above-mentioned respectively, to the Court of Appeal.

THE APPEALS

[20] We heard all these five appeals on 23 April 2018 and continued the hearing on 7 June 2018, having also considered further submissions by parties. After perusing the records of appeal and considering submissions from both parties, we made the following decisions:

Court of Appeal No	Enclosure	Application and Court of Appeal's decision
C-02(IM) -1438–07 of 2017	Encl 103	The plaintiff's application to release the balance of purchase price in the sum of RM8,187,915.56 to the first defendant within seven days from the date of this order after deducting the damages amounting RM1,707,593.50. Court: Appeal allowed. The respondent (plaintiff) to return the amount of RM1,707,593.50 within 20 days from today's date. Prayer (a) of the order (for application in encl 103) is set aside. No order as to cost. Costs in the High Court to be refunded to the appellant (defendant).
C-02(IM) -1439–07 of 2017	Encl 98	The first defendant's application for among others, a declaration that the plaintiff is liable for late payment interest in the sum of RM2,639,165.06 and the plaintiff's conduct of countermanding and stopping payment of the cheque amounts to a repudiation of the 2012 agreement and the 2016 order is dismissed with cost of RM6,000. Court: Appeal is struck out with no liberty to file afresh. No order as to costs. Costs in the High Court to be refunded to the appellant (defendant). Deposit refunded.
C-02(IM) -1440–07 of 2017	Encl 97	The first defendant's application for extension of time to file its affidavit to oppose the plaintiff's assessment of damages application is dismissed with costs of RM6,000 to the plaintiff. Court: Appeal is struck out with liberty to raise the issue therein at the Federal Court and/or Court of Appeal. No order as to costs. Costs in the High Court to be refunded to the appellant (defendant). Deposit refunded.

C-02(IM) -1441–07 of 2017	Encl 87	The first defendant's application for and order that Messrs Selva & Associates, accountant for the plaintiff to be produced to the court to be cross-examined on his report dated 20 July 2016 is dismissed with costs of RM6,000 to the plaintiff. Court: Appeal is struck out with liberty to raise the issue therein at the Federal Court and/or Court of Appeal. No order as to costs. Costs in the High Court to be refunded to the appellant (defendant). Deposit refunded.
C-02(IM) -1442–07 of 2017	Encl 78	The plaintiff's notice for assessment of damages — first defendant to pay the plaintiff the sum of RM1,707,593.50 and costs of RM5,000. Court: Appeal allowed. The order of the High Court in respect of assessment of damages (encl 78) is set aside. No order as to costs. Costs in the High Court to be refunded to the appellant (defendant). Deposit refunded.

[21] These are now our grounds for having so decided.

[22] Just as a brief recap, before us, parties agreed to deal with Appeal C-02(IM)-1442–07 of 2017 which concerned with encl 78 ie the plaintiff's notice for assessment of damages. The basis of the application is that the first defendant had delayed in delivering up vacant possession of the lands. The first defendant contended that it was not guilty of any delay as the plaintiff did not pay the balance of purchase price pursuant to the S&P executed in 2009. The first defendant also contended that the JC erred in law and/or fact in awarding the damages to the plaintiff as the plaintiff did not suffer any loss. Further, the defendant submitted before us that the plaintiff would be unjustly enriched if assessment of damages is allowed.

[23] The plaintiff conceded that the quantum of the assessment could be contested but the basis and correctness for ordering the assessment has merged with 12 February 2016 order and is caught by res judicata. For clarity on the issue, we reproduce below the written submission by plaintiff, like so:

> 12 In the light of the above, we humbly submit that it would contravene the principle of res judicata if the correctness of encl 54 is now reopened and reexamined by this honourable court when it was not appealed against in the first place. This would result in chaos in litigation. The cases on res judicata are replete. For convenience we will merely refer to the Federal Court's decision in *Government of Malaysia v Dato Chong Kok Lim* [1973] 2 MLJ 74:

> The law, as I understand it, is that the defendant is precluded from filing a second application in respect of a matter which was directly and substantially in issue in the earlier application (encl) in this very court. If a decision has been given with respect to a matter or part of a matter in controversy between the parties by a court of competent jurisdiction it remains binding in the subsequent stages of the same proceedings in the same court and cannot be reopened in that court. In my view *an erroneous decision irrespective of whether it is on a question of law or fact operates as res judicata between the parties to it.* (Emphasis added.) (See the respondent's outline submission at p 5 para 12.)

[24] To our minds, the issue as to the propriety, if not the legality of the order ordering an assessment of the damages is not caught by res judicata. We took the view that the order granting the application by the plaintiff in encl 54 in respect to it allowing for an assessment of damages as an order that was granted for want of jurisdiction. We had so found, because it was not disputed that the plaintiff had in fact abandoned the prayer on damages when it had the statement of claim amended in the course of pleadings.

[25] As regards the application of s 18 of the Specific Relief Act 1950 ('the SRA 1950') it was contended that the court granting the order has the power to award damages if it was of the opinion that merely granting the specific performance was inadequate as to constitute a remedy to the plaintiff's claim. We had occasion to peruse through the authorities cited to us on this issue, and with respect, we were in agreement with the learned counsel for the first defendant that the exercise of that power, as stipulated under s 18(3) of the SRA 1950, must be predicated upon the fact that there must be a specific prayer asking for damages in addition to the prayer for specific performance. In the regard, we would refer to the decision of this bench in the case of *NZ New Image Sdn Bhd v Loh Yok Liang* [2016] MLJU 1768; [2016] 9 CLJ 474 ('NZ New Image') where it was held that:

> [33] Section 18 of the Specific Relief Act 1950 does not give the appellant freedom to act as they wish for it clearly stipulates, and we say that learned counsel did not seem to realise, that a person 'may also ask for compensation' for the breach of contract which means therefore that the appellant must necessarily pray for the compensation in the statement of claim if it is intended that the appellant wishes to also seek for damages. In fact, illustrations provided in s 18(2), (3) and (5) plainly show that the plaintiffs sue for specific performance and for compensation, which was not the case here. Reference in this connection is made to O 81 r 1(1)(a) of the Rules of Court 2012 which clearly envisages a situation where an action for specific performance may be begun with or without an alternative claim for damages (*Insofex Sdn Bhd v Labasama Group Sdn Bhd* [2000] 7 MLJ 408; [2000] 6 CLJ 97). Accordingly, where a person wishes to claim for damages, he would have to do so by way of an alternative claim for damages. Or he can otherwise sue for specific performance only. In the present appeal, the essence of the appellant's claim in the circumstances of the case was for specific performance only. They did not seek the alternative remedy of damages in lieu of specific performance.

[26] We also would agree that the deficiency in the pleading in that regard as to damages, could not be saved by the catch-all clause that states, 'any order as the court deems fit' or any clause differently worded but having the same intended effect.

[27] As such, the court in ordering for assessment of damages in allowing encl 54 had acted in a manner where in fact it was wanting in jurisdiction when it had so granted that prayer for assessment of damages. The learned JC had given an order to a party who did not ask for such a prayer. Indeed, as it had come to pass, the plaintiff had abandoned that particular prayer for damages when it amended its statement of claim dated 12 April 2011 before pleadings were closed, by deleting para 27 xii (see *penyata tuntutan terpinda semula* para 27 xii). In other words, the JC was not clothed with the necessary jurisdiction to make any order in respect of assessment of damages, when in fact and in law, the plaintiff did not pray for such a relief. It was not seized of any jurisdiction in that regard. The effect of such an act by the court is that such order on assessment of damages is null and void. Section 18 of the SRA 1950 could not in the circumstances assist the plaintiff in that regard.

[28] However, we must be quick to add that such lack of jurisdiction was only limited to the assessment of damages issue. The rest of the order pertaining to encl 54 would, with respect, remain good and proper. We saw no reason to disturb the rest of the order of the learned JC apart from the impugned order made on the assessment of damages. We reproduce the order of the learned JC when granting encl 54, as follows:

> ... ADALAH DIPERINTAHKAN bahawa:
>
> (a) Pendaftar Hakmilik Negeri Pahang mendaftarkan plaintif sebagai pemilik berdaftar Geran No. 6927, Lot 2187, Mukim Sabai, Daerah Bentong, Negeri Pahang ('Hartanah Pertama'), Geran No. 9725, Lot 2186, Mukim Sabai, Daerah Bentong, Negeri Pahang ('Hartanah Kedua') dan Geran No. 6171, Lot 2215, Mukim Sabai, Daerah Bentong, Negeri Pahang ('Hartanah Ketiga') (secara kolektifnya sebagai 'Hartanah-hartanah tersebut') dalam masa 7 hari dari tarikh serahan perintah ini;
>
> (b) Defendan pertama menyerahkan milikan kosong dan hakmilik asal Hartanah-hartanah tersebut kepada plaintif dalam masa 7 hari dari tarikh perintah ini;
>
> (c) Peguamcara plaintif melepaskan baki harga belian untuk Hartanah-hartanah tersebut sebanyak RM8,207,915.56, butir-butir seperti di Lampiran A di sini kepada defendan pertama dalam masa 7 hari selepas (a) dan (b) dipatuhi;
>
> (d) *Satu pentaksiran ganti rugi atau di pilihan plaintif suatu akaun keuntungan dan pembayaran kepada plaintif kesemua jumlah wang yang didapati perlu dibayar setelah mengambil siasatan tersebut akibat daripada kelewatan defendan pertama untuk melaksanakan perjanjian jual beli bertarikh*

8–5–2012 untuk Hartanah-hartanah tersebut; dan A

(e) Kos sebanyak RM3,000 dibayar oleh defendan pertama kepada plaintif. (Emphasis added.)

[29] As to its effect, we were of the considered view that a null and void order need not be acted upon by the party against whom it was meant to operate. He would not need not to act upon it. He would not need to appeal against it. He may even attack it collaterally, if such a need arises. B

[30] We found support in our view in the decision of the Federal Court in the case of *Eu Finance Berhad v Lim Yoke Foo* [1982] 2 MLJ 37; [1982]1 LNS 21 ('*Eu Finance* case') which decision was subsequently approved in toto by the Privy Council. Abdoolcader J sitting on the Federal Court bench and speaking on its behalf, has said the following: C

> The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon? in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent. In *Harkness v Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729, 736, Lord Diplock LJ (now a law lord) said (at p 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'. D E
>
> Where a decision is null by reason of want of jurisdiction, it cannot be cured in any appellate proceedings; failure to take advantage of this somewhat futile remedy does not affect the nullity inherent in the challenged decision. The party affected by the decision may appeal 'but he is not bound to (do so), because he is at liberty to treat the act as void' *Birmingham (Churchwardens and Overseers) v Shaw* (1849) 10 QB 868, 880; 116 ER 329 (at p 880 per Denman CJ). In *Barnard v National Dock Labour Board* [1953] 2 QB 18, 34 it was said that, as a notice of suspension made by the local board was a nullity, 'the fact that there was an unsuccessful appeal on it cannot turn that which was a nullity into an effective suspension' (at p 34 per Singleton LJ). *Ridge v Baldwin* [1964] AC 40 is to the same effect. F G
>
> Lord Denning said in *Director of Public Prosecutions v Head* [1959] AC 83 (at p 111) that if an order was void, it would in law be a nullity and there would be no need for an order to quash it as it would be automatically null and void without more ado. Lord Denning as Master of the Rolls so held too in *Regina v Paddington Valuation Officer & Anor, Ex parte Peachey Property Corporation Ltd (No 2)* [1966]1 QB 380, 402 (at p 402). The judgment of this court in *Pow Hing & Anor v Registrar of Titles, Malacca* [1981] 1 MLJ 155, 157 refers (at p 157) to the decision of the House of Lords in *London & Clydeside Estates Ltd v Aberdeen District Council and another* [1980] 1 WLR 182, 189 and a passage in the judgment of the Lord Chancellor, Lord Hailsham of St Marylebone (at p 189) where he refers to a spectrum of possibilities as the legal consequence of non-compliance with statutory requirements and speaks of one extreme where there has been such an outrageous H I

A and flagrant violation of a fundamental obligation that what has been done may be safely ignored and treated as having no legal consequence and in the event of any reliance sought thereon the party affected is entitled to use the defect simply as a shield or defence without having taken any positive action of his own.

B **[31]** Applied the principle on nullity as expounded in the *EU Finance* case to the factual scenario in this case, when the proprietary of the assessment of damages was being challenged on the ground that it was granted for want of jurisdiction, and it was indeed established that the plaintiff had in fact abandoned the claim for damages when it amended the statement of claim, the C order for assessment had been rendered null and void as there was no legal basis upon which the learned JC could have made such an order, for the simple reason that there was no prayer for damages by the plaintiff in the first place. The JC was devoid of jurisdiction in respect of that matter.

D **[32]** Given that factual circumstance, it was open for the assessment of damages order to be challenged as to its legality and be subjected to legal scrutiny it deserved, and be treated accordingly henceforth.

E **[33]** Having considered the further submissions of both parties by respective learned counsel, we respectfully agreed with the first defendant that the order for assessment of damages was made for want of jurisdiction. It was a nullity and as a nullity, it could be ignored, or it could be attacked collaterally whenever it was intended to be used against the adverse party, in this case, F against the first defendant. On the authority of *Eu Finance* case it was open to the first defendant to challenge it when encl 78 was filed by the plaintiff for orders it deemed necessary to effectuate the impugned order of assessment. Abdoolcader J said: '... it can be disregarded and impeached in any proceedings, *before any court or tribunal and whenever it is relied upon? in other words, it is* G *subject to collateral attack'.* (Emphasis added.) Again, Denning MR had stated in the case of *Director of Public Prosecutions v Head* [1959] AC 83 (at p 111) that if an order was void, it would in law be a nullity and there would be no need for an order to quash it as it would be automatically null and void without more ado. The learned Master of the Rolls had repeated his view on the same H issue in the case of *Regina v Paddington Valuation Officer and another, Ex Parte Peachey Property Corporation Ltd* [1966] 1 QB 380. Lord Hailsham of Marylebone, LC also had occasion to express his opinion on the effect of a nullity and said: 'the party affected is entitled to use the defect simply as a shield or defence without having taken any positive action of his own' (see the case of I *London & Clydeside Estates Ltd v Aberdeen District Council and another* [1980] 1 WLR 182. As if to reemphasise the point, Abdoolcader J again reiterated his view on the matter in the case of *Pow Hing & Anor v Registrar of Titles, Malacca* [1981] 1 MLJ 155, wherein he cited with approval the speech by Lord Hailsham of Marylebone in the *London & Clydeside Estates Ltd*.

OUR FINDINGS

[34] Premised upon the above, it was clear that the learned JC had made an order for an assessment of damages for want of jurisdiction, that it was in actuality a nullity. Since there was no prayer for damages in the first place by the plaintiff, there existed no legal basis for the learned JC to grant the order for an assessment of damages when he granted encl 54.

[35] That being the case, there also was no basis for the learned JC to deal with and grant the various applications filed by both parties in relation to encl 76 which was filed by the plaintiff as a purported consequence of the order granted on the assessment of damages in encl 54.

CONCLUSION

[36] In the circumstances, we had thus made the following orders:

Appeal 1438 — Appeal allowed. The respondent to return the amount of RM1,707,593.50 within 20 days from today's date. Prayer (a) of the order (for application in encl 103) is set aside. No order as to costs. Costs in the High Court to be refunded to the appellant.

Appeal 1439 — Appeal is struck out with no liberty to file afresh. No order as to costs. Costs in the High Court to be refunded to the appellant. Deposit refunded.

Appeal 1440 — Appeal is struck out with liberty to raise the issue therein at the Federal Court and/or Court of Appeal. No order as to costs. Costs in the High Court to be refunded to the appellant. Deposit refunded.

Appeal 1441 — Appeal is struck out with liberty to raise the issue therein at the Federal Court and/or Court of Appeal. No order as to costs. Costs in the High Court to be refunded to the appellant. Deposit refunded.

Appeal 1442 — Appeal allowed. The order of the High Court in respect of assessment of damages (encl 78) is set aside. We made no order as to costs. Costs in the High Court to be refunded to the appellant. Deposit, if any paid, are to be refunded to the appellant.

Order accordingly.

Reported by Nuzul Fitrie